DEFERRED REBATE SYSTEMS

By Herbert Barber,

President of Barber and Company, Inc., New York.

The term "rebate," as generally understood in the United States, refers to a more or less secret and underhand allowance granted by a transportation company to secure traffic. In that sense the term "rebate" as applied to the steamship business is a misnomer.

Rebates as now applied to the steamship business originated in Europe and were used there fully twenty years before their introduction into the United States. According to the present-day plan two or more steamship companies unite to furnish a service at stated intervals, and, to secure sufficient traffic to warrant the venture, issue a circular publicly to all the shippers—offering to allow them a return or commission or discount on the amount of freight they furnish, provided they (the shippers) will confine their shipments during a stated period to the steamers of the signatory lines. The promised return is payable at the end of the period, or at a certain interval after the expiration of the period, provided that during the whole of that time the shippers have found it to their advantage to ship their freight over the stated route by the signatory line or lines of steamers.

When first introduced the allowance was paid at the end of a short interval, just sufficient to enable accounts to be checked up after the expiration of the term. But as time went on and shippers made no complaint steamship owners extended the period when payment of the return became due, so that some rebate circulars called for twelve months continued shipments and made the returns payable six months, thereafter, i.e., the shipper had to continue his shipments for eighteen months before any rebate was collectible. Such a rebate is characterized as a "deferred rebate" to differentiate it from the rebate payable at the end of the "loyalty period."

In the export trade from the United States rebates were first introduced as a system into the steamship business by the lines running between New York and Brazil and New York and the

River Plate. The South African lines adopted a rebate system in 1897, and the Far East (China-Japan) lines followed in 1899. Rebates were also adopted in the West Indies trades and still continue, but in all the other above mentioned trades outward from New York rebates have been discontinued, and it is very doubtful whether they will ever be renewed.

Theoretically the rebate system protected the regular line steamers from outside competition, but in actual service no rebate system has ever prevented any strong line from breaking into and obtaining a foothold in any trade of which it desired to secure a share. The only protection a rebate system gives the regular lines is from the competition of the casual tramp steamer, which would often be only too willing to run a casual voyage at a cut rate of freight and thus unsettle rates for the liners for months to come. A rebate system effectively prevents any such competition, since large shippers invariably have sufficient rebates due them at the end of the term to make any gain that would arise through shipping by the casual tramp steamer of no use to them.

The abolition of rebates in the outward business from New York to South America, South Africa and the Far East has had little or no effect upon the various services affected thereby. Steamship owners have saved the rebates they would otherwise have paid, but on the other hand they have doubtless been more willing to meet the wishes of shippers, and a better feeling prevails between shippers and steamship interests than obtained when the shipper felt himself bound to continue his shipments by the lines or forfeit a large sum of accumulated rebates.

Rebate systems are in full force in most of the long-voyage trades from European ports to countries other than the United States, and also on the return business from those foreign countries to Europe. Such systems are also in force on the lines running from the Far East via the Suez Canal to the United States, and from some of the South American ports to this country. The rebate circulars are in all cases issued in the foreign countries and the rebates are paid to the shippers at the ports of shipment. These rebate systems are open to all shippers alike, i.e., all are on an equal footing, and a great majority of the shippers express their approval of them. They realize that under the present system they have the benefit of a much more regular service and more stable rates, and also find that

shipowners are always willing to meet the exigencies of the market and help them to do business by reducing rates whenever necessary. Very little objection has been raised in this country (outside of Washington congressional committees) to the rebates paid shippers on their import business, the reason being that in the vast majority of transactions the foreign shipper sells his produce to the American importer at a price covering cost, freight, and insurance, so that the buyer has no interest whatever in the rate or the terms on which the shipper secures the freight, and is therefore not concerned about the rebate.

The question of the legality of deferred rebates as applied to the steamship business has sometimes been raised, but litigation in this country concerning such rebates has been remarkably limited. Some rebates that were withheld by the Brazil lines became the subject of litigation in the courts, but in all instances terms of settlement were arranged without the courts pronouncing judgment. There is, however, a lawsuit involving the legality of such rebates that bids fair to parallel the famous case of Jarndyce *vs.* Jarndyce, immortalized by Dickens. In the early days of this century the Houston and Prince lines were fighting their way into the New York-South African trade, and a shipper who had been offered an inducement in the way of cut rates decided to ship his cargo by the opposition lines. When the rebate period was up and he applied for some $5,000 to $6,000 in rebates from the regular lines, payment was refused on the ground that he had clearly violated the terms of the rebate circular under which rebates could be claimed. The shipper, however, was not willing to take "no" for an answer and commenced suit against all the lines, alleging that the rebate circular clearly showed that there was a combination in restraint of trade. He, therefore, invoked the Sherman act, claiming triple damages from the lines. After a three days' trial in court, the judge directed a verdict for the defendants, stating in his opinion that inasmuch as the plaintiff by his own evidence showed that he had no trade to South Africa until after the steamship lines put in their service, and that he had built up a considerable trade, collecting at regular intervals large amounts of rebates from the different lines, it was clear that the combination of steamship lines had built up his trade, and that if he had thought it advantageous to ship his cargo by competing steamers he had clearly broken the terms of the rebate

circular. The plaintiff appealed against this decision, and on a technicality the judgment was reversed and the case set for a new trial. A year or two later the second trial was held and the judge then charged that the rebate circular clearly showed that there was a conspiracy in restraint of trade, and, as all such conspiracies had been held by the court of appeals to be illegal, judgment was directed for the plaintiff for some $25,000, being triple damages with interest. The steamship companies then appealed the case, presumably on the ground that the judge would not allow evidence as to the reasonableness of the combination, and the court of appeals in this case reversed the judgment and were remitting the case for another new trial, when the plaintiff elected to go to the Supreme Court at Washington without going through the motions of a third trial. The case has been argued before the Supreme Court and now awaits its decision, but as far as the courts have ruled in this case the steamship people urge that deferred rebates are legal and that conferences are not in restraint of trade but, instead, further and build up trade.

In Europe law suits for withheld rebates have been much more frequent than in this country. As a rule the courts there have upheld the legality of the rebate conditions laid down by the conference lines, and shippers who have not complied with those conditions do not collect their rebates. London *Fairplay* reports on the 25th of last June that—

> An interesting Belgian lawsuit has just been definitely decided on appeal. An Antwerp firm of shipowners had established a regular steamship service to Brazilian ports in competition with the Brazilian conference, whereupon the members of the conference instituted a system of special rebates in favour of the shippers patronizing their boats. The Antwerp owners then sued the conference before the tribunal of commerce of Ghent. The tribunal decided against the conference, and condemned the rebate circular issued to shippers as being illegal. The members of the conference contested this decision by appealing to the appeal court of Ghent, and got a judgment in their favor, the court giving the opinion that shipping conferences and rebate circulars issued by them were not contrary either to law or good manners, but were, on the contrary, legitimised by the freedom of trade. The Antwerp shipowners, however, demurred to this decision, and in their turn, appealed to the Belgian supreme court of appeal. This appeal was rejected, and the judgment of the appeal court of Ghent consequently attains the force of law.